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TOLSTOY AND THE CHRISTIAN LAWYER

Raymond B. Marcin⁺

It may be that there is no literate person alive in the Western world who has not heard of Count Lyof Nikolaevich Tolstōi (Tolstoy), author of what some have called the quintessential novel among all recorded literature: *War and Peace*.¹ It may also be that most literate persons are aware that Tolstoy was a moralist of some renown—of great renown in his day—whose pacifist thought presaged and influenced Mohandas K. Gandhi, the great and saintly Mahatma of India. One doubts, however, whether many are aware that Tolstoy penned what is perhaps the most devastating attack in all religious literature on the thesis that a Christian can be a lawyer and remain a true Christian.

I. THE PROBLEM

We often espouse great ideals in the context of law and lawyering, but whenever we turn our attention to the world of contemporary reality, we are forced to admit that there is something wrong with law and lawyering. We speak of a “litigious society” and shamefacedly acknowledge that we have become one of the most – if not *the* most – litigious societies in the history of the world. When we ask ourselves *why*, we tend to assign causation to what are, perhaps, only symptoms of the malady: the glut of lawyers, the “me” generation, or the profit motivation. For these reasons and perhaps others, many people in today’s society seem to shrink away from involvement with law. Many others, however, use it precipitously and wrongly — all too *litigiously*. Lawyers, it is often said, in semi-serious mockery, are generally disliked in our society.

It is not easy to identify what is wrong with law, lawyering, and the legal system in general. One is tempted to say that, if only laws were more humane, if legal processes were less forbidding, and if lawyers were nicer, the problem would go away. The problem, however, runs deeper than that. If one thinks deeply enough, one is moved to doubt whether it is simply a problem of putting the ideals of law, lawyering, and the legal

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1. LEO TOLSTOY, *WAR AND PEACE* (George Gibian ed., Louise & Aylmer Maude trans., W.W. Norton & Co. 1966) (1922).

system to work. One is moved to ask whether there might be a problem with the *ideals* themselves. One thinks of law's highest ideal — justice — and is at a loss to think of one recent war or social conflict that was not or is not being fought in the name of that ideal *on both sides*. One thinks of lawyering's highest ideal — full and fair representation within an adversary system — and is moved to smile wanly at the suggestion that the winning and losing litigants might shake hands in friendship after a lawsuit. From their highest ideals, law divides us, and lawyering exacerbates social wounds. The problem may be that we use law's highest ideal — justice — as a means, rather than seeking it as an end, and the goal of lawyering in our society is all too often victory, when what is really needed is healing.

What does it mean to *be* a *Christian* lawyer? Does a Christian lawyer help people to stand up for their rights? Does a Christian lawyer help to get recompense for people who have been cheated? Does a Christian lawyer prosecute people who have harmed others criminally? Does a Christian lawyer help oppressed people to resist oppression? Does a Christian lawyer fight against the evils in society? Should not a *good* Christian lawyer do *all* these things? Does one have to be a *Christian* in order to be motivated by sentiments such as these?

To depart from the specifically *Christian* context for a moment, the philosopher Martin Heidegger once retold the following old fable in an effort to explain his understanding of what it is to be a human being:

Once when "Care" was crossing a river, she saw some clay; she thoughtfully took up a piece and began to shape it. While she was meditating on what she had made, Jupiter came by. "Care" asked him to give it spirit, and this he gladly granted. But when she wanted her name to be bestowed upon it, he forbade this and demanded that it be given his name instead. While "Care" and Jupiter were disputing, "Earth" arose and desired that her own name be conferred on the creature, since she had furnished it with part of her body. They asked Saturn to be their arbiter, and he made the following decision, which seemed a just one: "Since you, Jupiter, have given its spirit, you shall receive its spirit at its death; and since you, 'Earth,' have given its body, you shall receive its body. But since 'Care' first shaped this creature, she shall possess it as long as it lives. And because there is now a dispute among you as to its name, let it be called "*homo*," for it is made out of *humus* (earth).²

2. MARTIN HEIDEGGER, BEING AND TIME 242 (John Macquarrie & Edward Robinson trans., Harper & Row 1962) (1927).

The poet Juvenal expressed a similar sentiment:

From heaven's height
a heaven-born sympathy we drew.
To us the Maker gave a soul
that mutual kindly feeling might us prompt
to seek and render aid,
and peoples form from scattered dwellers.³

In the minds of poets and philosophers, *care*, that *mutual kindly feeling*, is one of the highest qualities in human nature. To return to the Christian context, we all, of course, recognize the euphonious chord struck by John Donne's "no man is an island . . ."⁴ We might expect these sensibilities to inform and give meaning to our highest social ideals. Sometimes they do.

We think of our Judeo-Christian ideals of care and concern for our fellow brothers and sisters and are bold enough to suggest that the hope of law and lawyering might lie in those ideals. Lawyers should be *knight in the right*, helping their fellow brothers and sisters to stand up against and oppose all injustices and oppressions. In those ideals, if nowhere else, the hope of salvation from our divisive litigiousness might lie. In those ideals, we may find what has long been missing. Tolstoy would *disagree* — and would have us believe that Jesus Christ Himself would also *disagree*. An ethic of care and concern for our fellow human beings is, of course, not the exclusive province of the Judeo-Christian world view. Heidegger's fable and Juvenal's poetic vignette are examples of such an ethic found outside Christianity; indeed, they come in the context of what we might call a *pagan* mind set. Yet they both undeniably espouse a morality of care and concern. An ethic of care and concern, one must admit, is not an exclusively Christian ethic. What is it that is specifically different about the Christian ethic? Tolstoy saw something deep and profound in the teachings of Jesus — something that can fairly be characterized as unique.

II. TOLSTOY'S UNDERSTANDING OF CHRIST AND CHRISTIANITY

It might be a mistake to call Tolstoy a Christian, although one can be certain that he would have claimed that title, and there are some in the

3. JUVENAL, *THE SATIRES*, XV, lines 146-153 (Niall Rudd trans., Clarendon Press 1991).

4. JOHN DONNE, *DEVOTIONS UPON EMERGENT OCCASIONS* 87 (Anthony Raspa ed., Oxford Univ. Press 1987) (1624) ("No Man is an Island, intire of it selfe; every man is a peece of the *Continent*, a part of the *maine* . . .").

Christian denominations who would happily give it to him. The trouble with calling Tolstoy a Christian is that he quite clearly did not believe in the divinity of Jesus Christ. Tolstoy wrote:

I regard Jesus as the same kind of man we all are, and I believe it to be the greatest sacrilege and an evident proof of heathenism, to regard him as God. To consider Jesus as God is to renounce God.⁵

Such a bold and hostile denunciation must have served some sort of structural purpose in Tolstoy's understanding of theology, but Tolstoy had never fully explained why he felt it necessary to deny that Jesus is God.⁶ He must have known that a far greater explanation would be expected by the many in his audience who believed the opposite of Tolstoy's words, that to consider Jesus as being God is to *affirm*, not renounce, God. Tolstoy's bold denunciation of the divinity of Jesus is all the more curious in light of the gentle change of mood in the paragraph immediately following the one quoted above:

Jesus I regard as a man, but his teaching I regard as Divine, in so far as it expresses Divine truths. I know no higher teaching. It has given me life, and I try as far as I can to follow it.⁷

That gentle change of mood, however, was not enough to keep the Orthodox Greek Church, the national church of Russia, from excommunicating Tolstoy at its synod in February of 1901.⁸ The grounds for the excommunication, according to Tolstoy, were his "seductive false teachings."⁹ It is easy to sense the seductiveness of Tolstoy's teachings in his eager acknowledgment of the divinity in Jesus' *teaching*. Were it not for that bold, unequivocal denunciation of belief in the divinity of Jesus Himself, one might well have assumed, from his other writings, that Tolstoy *did indeed* accept Jesus as God Incarnate. In one of his short stories, *Walk in the Light While There Is Light: A Story of Early Christian Times*, set in the second century A.D. in the city of Tarsus, Tolstoy told

5. Lyof N. Tolstōi, *On Reason, Faith, and Prayer* (Jan. 1901), in WHAT IS RELIGION? AND OTHER NEW ARTICLES AND LETTERS 160 (V. Tchertkoff & A.C. Fifield trans., 1902).

6. The reason may well lie somewhere in Tolstoy's visceral dislike of all organized Christian churches of his day. The prime tenet of each was, of course, the divinity of Jesus Christ. See, e.g., Lyof N. Tolstōi, *My Reply to the Synod's Edict Excommunicating Me on February 20-22 and to Letters Concerning It* (Apr. 4, 1901), in TOLSTOI, WHAT IS RELIGION, *supra* note 5, at 106-107; LEO TOLSTOY, HOW I CAME TO BELIEVE (MY CONFESSION) 51-52, 58-60 (Free Age Press 2d ed. 1901) (1882); COUNT LEO TOLSTOI, MY RELIGION 58 (Huntington Smith trans., rev. ed. 1885).

7. TOLSTOI, WHAT IS RELIGION, *supra* note 5, at 160.

8. See HENRI TROYAT, TOLSTOY 676-78 (Nancy Amphoux trans., 1967).

9. TOLSTOI, MY REPLY TO THE SYNOD, *supra* note 6, at 105.

of several conversations between two friends, Pamphilius, a Christian, and Julius, a pagan, who kept meeting each other after hiatuses of several years.¹⁰ Pamphilius, in the years in which they had first been separated, had become a Christian and had been living in the poverty and submissiveness that characterized those early pre-Constantinian Christians.¹¹ Julius, however, had been living in the upwardly mobile comfort and ambition that still, to this day, characterizes the worldly.¹² Pamphilius, the Christian, seemingly possessed of nothing, was nonetheless happy, and Julius, the pagan, seemingly wanting for nothing, realized that he knew only malaise and wondered why.¹³ With obvious approval from Tolstoy, after explaining the teachings of Jesus concerning love and true happiness, Pamphilius announced to his pagan friend:

Our master is the son of God and a mediator between God and men, not because someone has said so and we blindly believe it, but because all who seek God find His son before them on the path and involuntarily come to understand, to see, and to know God, only through him.¹⁴

Knowledge of God *through* Jesus, according to Tolstoy's Christian, Pamphilius, is experiential, not doctrinal.¹⁵ In an odd sense, Tolstoy may be considered a Christian fundamentalist but a fundamentalist *not* of the *letter*, the letter that men believe because someone has said so, but of the *spirit*, the spirit that lies at the core of the letter, the core of all doctrinal formulations. Some never find the life-giving core of the formulations because they only blindly believe that which someone has told them to believe, and making a fortress out of the doctrinal formulation stifles the life-giving spirit that animates the very meaning of that formulation. "For the letter killeth; but the spirit quickeneth [*i.e.*, gives life]."¹⁶ These are seductive teachings indeed.

From an orthodox Christian perspective, one may wish mightily that Tolstoy, a man who passionately and with obvious conviction proclaimed that the teaching of Jesus had *given him life*,¹⁷ had not overlooked the one teaching of Jesus that might have made all the difference: Jesus' own

10. LEO TOLSTOY, *WALK IN THE LIGHT & TWENTY-THREE TALES* 8-68 (Louise & Aylmer Maude trans., Plough Pub. House 1998) (1928).

11. *See id.* at 10.

12. *See id.* at 15.

13. *See id.* at 8-19.

14. *Id.* at 38.

15. *See id.*

16. 2 *Corinthians* 3:6 (Douay Rheims).

17. *See* TOLSTOI, *MY RELIGION*, *supra* note 6, at ix.

express claims to Divinity.¹⁸ Yet despite that flaw in Tolstoy's theology, one may nonetheless see, in Tolstoy's bold denunciation of orthodox Christian doctrinal formulations and in his embracement of the person and teachings of Jesus, a refreshing and admirable shucking of the shell to get at the kernel of the Living Truth Itself.

A. Tolstoy's Argument

It is with this admittedly grave reservation — that Tolstoy's understanding of the teachings of Jesus was either grievously flawed or profoundly insightful at its most basic point — that we now proceed to examine his views on Christians as lawyers. Tolstoy's challenge to Christian lawyers came in the context of a passage in Jesus' Sermon on the Mount, which has within it, according to William Barclay, the essence of the Christian ethic:¹⁹

You have heard that it hath been said, An eye for an eye, and a tooth for a tooth. But I say to you not to resist evil: but if one strike thee on thy right cheek, turn to him also the other: And if a man will contend with thee in judgment, and take away thy coat, let go thy cloak also unto him. And whosoever will force thee one mile, go with him other two.²⁰

According to one commentator, Jesus' injunction of nonresistance to evil is "probably the most paradoxical of all the sayings of the [Sermon] and has certainly been the object of more rationalization than any other."²¹ Tolstoy would, and did, agree.²² It was that very passage in the Sermon on the Mount that occasioned Tolstoy's own religious conversion.²³ Until his understanding of that passage, Tolstoy had been a self-confessed nihilist.²⁴ Tolstoy wrote:

18. Tolstoy did refer to those claims as "vague[]," "very obscure," and "inconsiderable." TOLSTOI, MY RELIGION, *supra* note 6, at 58.

19. 1 WILLIAM BARCLAY, THE GOSPEL OF MATTHEW, 162-63 (William Barclay trans., Westminster Press 1975) (1956).

20. *Matthew* 5:38-41 (Douay Rheims); *see also* *Isaias* 50:6 (Douay Rheims) ("I have given my body to the strikers, and my cheeks to them that plucked them: I have not turned away my face from them that rebuked me, and spit upon me."); *Lamentations* 3:30 (Douay Rheims) ("He shall give his cheek to him that striketh him, he shall be filled with reproaches.").

21. John L. McKenzie, S.J., *The Gospel According to Matthew*, in 2 THE JEROME BIBLICAL COMMENTARY, 62, 72 (Joseph A. Fitzmyer, S.J. & Raymond E. Brown, S.S. eds., 1968).

22. *See* TOLSTOI, MY RELIGION, *supra* note 6, at 11-12.

23. *See* Martin Green, *Forward to LEO TOLSTOY, THE KINGDOM OF GOD IS WITHIN YOU: CHRISTIANITY NOT AS A MYSTIC RELIGION BUT AS A NEW THEORY OF LIFE* ix (Constance Garnett trans., Univ. of Neb. Press 1984) (1894).

24. *See* TOLSTOI, MY RELIGION, *supra* note 6, at ix.

It seems . . . that Jesus meant precisely what he said. We may declare the practice of such a rule [of nonresistance to evil] to be very difficult; we may deny that he who follows it will find happiness; we may say with the unbelievers that Jesus was a dreamer, an idealist who propounded impracticable maxims; but it is impossible not to admit that he expressed in a manner at once clear and precise what he wished to say; that is, that according to his doctrine a man must not resist evil, and, consequently, that whoever adopts his doctrine will not resist evil. And yet neither believers nor unbelievers will admit this simple and clear interpretation of Jesus' words.²⁵

Tolstoy's challenge is for us not to rationalize. Jesus simply and straightforwardly meant what He said.²⁶ Christians should not resist evil.²⁷ When sued, even unjustly, they should not defend; rather, they should give. In Tolstoy's words:

When I understood the command, "*Resist not evil*," in its proper sense, the first thing that occurred to me was that tribunals [*i.e.*, courts], instead of conforming to this law, were directly opposed to it, and indeed to the entire doctrine; and therefore that if Jesus had thought of tribunals at all, he would have condemned them.

Jesus said, "*Resist not evil*"; the sole aim of tribunals is to resist evil. Jesus exhorted us to return good for evil; tribunals return evil for evil. Jesus said that we were to make no distinction between those who do good and those who do evil; tribunals do nothing else. Jesus said, Forgive, forgive not once or seven times, but without limit; love your enemies, do good to them that hate you — but tribunals do not forgive, they punish; they return not good but evil to those whom they regard as the enemies of society.²⁸

25. *Id.* at 11-12.

26. *See id.*

27. The various translations have Jesus enjoining us to resist "evil," "the evil one," and "an evil one," or "one who is evil." *See, e.g., Matthew 5:38-41* (King James) (using "evil" as the translation); *Matthew 5:38-41* (New American) (translating the passage to read "one who is evil"); *Matthew 5:38-41* (New International) (including the translation as "an evil person"). McKenzie relied on context to suggest that the person ("the evil one") rather than the neuter ("evil") was meant. *See McKenzie, supra* note 21, at 72. Much earlier, however, Saint Augustine, opted for the neuter "evil" for similar reasons. Saint Augustine, *Commentary on the Lord's Sermon on the Mount with Seventeen Related Sermons*, in *THE FATHERS OF THE CHURCH SERIES 82* (Denis J. Kavanagh, O.S.A., trans., The Catholic University of America Press 1951).

28. TOLSTOI, *MY RELIGION*, *supra* note 6, at 25.

B. The Implications of Tolstoy's Argument for the Christian Lawyer

The implications for the Christian lawyer seem unmistakable. Lest we are tempted, as we are when we read Jesus' remarkable nonresistance-to-evil injunction, to suggest that Jesus must have been thinking in *nonlawyerly* contexts; we must somehow account for the fact that Jesus Himself followed the nonresistance-to-evil command with the *three specific examples* of the kind of contexts He had in mind. All three examples involve situations that unmistakably implicate courts, lawyers, and lawyering: the *criminal assault* ("if one strike thee on thy right cheek, turn to him also the other"),²⁹ the *civil lawsuit* ("if a man will contend with thee in judgment and take away thy coat, let go thy cloak also unto him"),³⁰ and the *act of political oppression* ("whosoever will force thee one mile, go with him other two").³¹ Clearly, Jesus must also have had everyday, non-legal, non-lawyerly contexts in mind, but His examples leave scant room to argue that His nonresistance-to-evil ethic does *not* apply to the legal-rights and litigation situations.

Ponder our lawyerly ideals. Lawyers help their clients to resist the demands that others make on them.³² In the most comfortable situation, lawyers help their clients to resist the *unjust* demands made on them.³³ In the ideal situation, in the highest tradition of the bar³⁴ — indeed in the highest tradition of what most would regard as *Christian* lawyering — lawyers help unjustly oppressed people to resist unjust oppression. Yet as Tolstoy has noted, *none* of these lawyerly activities, from the most pedestrian to the most idealistic, is in accord with Jesus' teaching.³⁵ Supposedly good Christian lawyers *help people to resist evil* and yet, Jesus has told us in the clearest possible terms, with undeniably relevant

29. *Matthew* 5:39 (Douay Rheims).

30. *Matthew* 5:40 (Douay Rheims).

31. *Matthew* 5:41 (Douay Rheims). Commentators regard this example as a reference to the practice of the Roman occupation troops in Palestine (Israel), which sometimes forced the local people to carry their baggage for a distance. See, e.g., NEW GENEVA STUDY BIBLE 1513 (Luder Whitlock, Jr. et al. eds., 1995).

32. See generally MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1980) (stating that an attorney "has the duty of assisting members of the public to secure and protect available legal rights and benefits").

33. See generally *id.* ("In our government of laws and not of man, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.").

34. See, e.g., *id.* Canon 7. See generally GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* (1978).

35. See TOLSTOI, *MY RELIGION*, *supra* note 6, at 11-12.

examples, and in the very midst of the one Sermon that all seem to accept as elucidating the very essence of His teaching, *resist not evil*.

The nonresistance-to-evil command is so counter-intuitive to the lawyer's mind-set, and even to the *Christian* lawyer's mind-set, that one might entertain the thought that Jesus really did not mean what He said or that it was simply an off-hand comment. The trouble with that line of thinking, aside from one's acceptance of the Bible as the inerrant word of God, lies in the fact that the nonresistance-to-evil command was uttered at the rhetorical high point of the Sermon that crystallized the very essence of His teaching.³⁶ Tolstoy observed:

"*Resist not evil*" is the central point of Jesus' doctrine; it is not a mere verbal affirmation; it is a rule whose practice is obligatory. It is verily the key to the whole mystery; but the key must be thrust to the bottom of the lock. When we regard it as a command impossible of performance, the value of the entire doctrine is lost.³⁷

C. The Implications Suggested by Tolstoy

Tolstoy broadened his attack on the work of judges and lawyers into an attack on all institutions of human justice by combining Jesus' injunction against judging³⁸ with Jesus' impossible-to-satisfy demand that only morally perfect persons apply the law.³⁹ We tend *not* to link Jesus' injunction against judging others with the nonresistance-to-evil teaching, and certainly not with the context of judging in our court systems, but Tolstoy made the case for *both* connections. First, however, he acknowledged the conventional wisdom and wrote:

The courts in which I served, and which insured the safety of my property and my person, seemed to be institutions so indubitably sacred and so entirely in accord with the divine law, it had never entered into my head that the words I have quoted [*i.e.*, "judge not, that you may not be judged"] could have any other meaning than an injunction not to speak ill of one's neighbor. It never occurred to me that Jesus spoke in these words of the courts of human law and justice. It was only when I understood the true meaning of the words, "*resist not evil*,"

36. See *id.* at 16-17.

37. *Id.*

38. See *id.* at 27-37; see also *Matthew* 7:1 (Douay Rheims) ("Judge not, that you may not be judged.").

39. See TOLSTOI, *MY RELIGION*, *supra* note 6, at 26; *John* 8:1-11 (Douay Rheims) (recounting the instance of the woman taken in adultery).

that the question arose as to Jesus' advice with regard to tribunals.⁴⁰

Tolstoy then explored the connections between the two statements. Both statements were proclaimed within the same Sermon on the Mount, and although Saint Matthew separates the nonresistance-to-evil command and the "judge not" command,⁴¹ Saint Luke, in his account of the Sermon on the Mount, places the two commands together, with the "judge not" command immediately following the elucidation of examples in connection with the nonresistance-to-evil command.⁴² Even in Saint Matthew's Gospel, the textual separation is not necessarily a contextual separation. In terms of Biblical hermeneutics, Tolstoy noted that the word used for "judge" in the "judge not" passage,⁴³ the Greek word *krino*, is the same as the word used for "judgment," *i.e.*, sue in court, in the nonresistance-to-evil passage:⁴⁴ "if a man will contend with thee in *judgment* and take away thy coat, let go thy cloak also unto him."⁴⁵

Although the Greek word *krino* is most often used to mean "judge" in the legal, courtroom sense, it is not always or invariably so used. Tolstoy, however, found a connection between the legal sense of judging conveyed by the Greek word *krino* and the passages we have been examining.⁴⁶ He found it in the Epistle of Saint James in a passage in which Saint James seems to be explaining the very "judge not" teaching from the Sermon on the Mount:

Detract not [*i.e.*, do not speak evil of] one another, my brethren. He that detracteth his brother, or he that judgeth [*krino*] his brother, detracteth the law, and judgeth [*krino*] the law. But if thou judge [*krino*] the law, thou art not a doer of the law, but a judge [*krino*], the noun form of [*krino*]. There is one lawgiver and judge [*krino*] that is able to destroy and to deliver.⁴⁷

The "one lawgiver and judge" is, of course, God Himself. Tolstoy believed that Jesus had human institutional justice and lawyerly contexts

40. TOLSTOI, MY RELIGION, *supra* note 6, at 23.

41. In Saint Matthew's Gospel, in between the nonresistance-to-evil command, *Matthew* 5:39 (Douay Rheims), and the "judge not" command, *id.* at 7:1, Jesus teaches us the "Our Father," *id.* at 6:9-13, the proper mode of fasting, *id.* at 6:16-18, the impossibility of serving both God and mammon, *id.* at 6:24-25, and the lesson of the lilies of the field, *id.* at 6:28-34.

42. *Luke* 6:27-37 (Douay Rheims).

43. *Matthew* 7:1 (Douay Rheims); *Luke* 6:37 (Douay Rheims).

44. See TOLSTOI, MY RELIGION, *supra* note 6, at 33-37; see also *Matthew* 5:40 (Douay Rheims).

45. *Matthew* 5:40 (Douay Rheims).

46. TOLSTOI, MY RELIGION, *supra* note 6, at 27-29.

47. *James* 4:11-12 (Douay Rheims).

in mind when He made the nonresistance-to-evil and “judge not” injunctions twin centerpieces of His teaching. One of the scriptural examples Tolstoy used in support of this thesis was the account, in Saint John’s Gospel, of the woman taken in adultery:

And the scribes and Pharisees bring unto him a woman taken in adultery: and they set her in the midst, And said to him: Master, this woman was even now taken in adultery. Now Moses in the law commanded us to stone such a one. But what sayest thou? And this they said tempting him, that they might accuse him.

But Jesus, bowing himself down, wrote with his finger on the ground. When therefore they continued asking him, he lifted up himself, and said to them: He that is without sin among you, let him first cast a stone at her. And, again stooping down, he wrote on the ground. But they hearing *this*, went out one by one, beginning at the eldest. And Jesus alone remained, and the woman standing in the midst. Then Jesus lifting up himself, said to her: Woman, where are they that accused thee? Hath no man condemned thee? Who said: No man, Lord. And Jesus said: Neither will I condemn thee. Go, and now sin no more.⁴⁸

According to Tolstoy’s interpretation:

Jesus, . . . [w]hen the sentence against the woman taken in adultery was about to be carried into execution, . . . absolutely denied the possibility of human justice, and demonstrated that man could not be the judge since man himself was guilty.⁴⁹

The lesson that Tolstoy drew from that Gospel incident, coupled with Jesus’ own example of what He meant by His nonresistance-to-evil injunction,⁵⁰ convinced Tolstoy that nonparticipation in human systems of justice was a Christian duty.⁵¹ Tolstoy’s arguments are compelling, but Saint Paul’s recognition that human systems of justice derive their authority from God leaves Tolstoy’s scriptural arguments in a less tenable position.⁵² It is perhaps that fact and similar over-enthusiasms on Tolstoy’s part that have kept many serious Christian scholars from wrestling with his nonresistance-to-evil dilemma for lawyers. For example, most would likely consider the following statement of Tolstoy to be naively sanguine at best, especially when viewed from today’s “real world” perspective:

48. *John* 8:3-11 (Douay Rheims).

49. TOLSTOI, MY RELIGION, *supra* note 6, at 26.

50. See *Matthew* 5:40 (Douay Rheims) (“[I]f a man will contend with thee in judgment, and take away thy coat, let go thy cloak also unto him.”).

51. See TOLSTOI, MY RELIGION, *supra* note 6, at 11-12.

52. *Romans* 13 (Douay Rheims).

The Christian will not dispute with anyone, nor attack anyone, nor use violence against anyone. On the contrary, he will bear violence without opposing it. But by this very attitude to violence, he will not only himself be free, but will free the whole world from all external power.⁵³

We do Tolstoy and ourselves a disservice, however, if we simply dismiss his nonresistance-to-evil argument without acknowledging its force and, indeed, its validity.

III. ANSWERS TO TOLSTOY?

Interpretations of Jesus' nonresistance-to-evil mandate, of course, abound in both scholarly and popular contexts. We see ethics of forgiveness and selflessness in the Hebrew Scriptures,⁵⁴ in the faith of God's chosen people, and in many, if not most, of the religions and philosophies of the world.⁵⁵ Jesus' nonresistance-to-evil ethic, however, goes beyond forgiveness and even beyond a denial of selfish acquisitiveness. What makes Jesus' ethic so unusual, so out-of-the-ordinary? Perhaps, it is its generosity. Jesus' ethic goes beyond selflessness and forgiveness, demanding an *affirmative* showing of non-resentment, acceptance, and forgiveness. Turn the *other* cheek.⁵⁶ Give the *cloak* as well.⁵⁷ Walk the *extra* mile.⁵⁸ It is, in its shocking demand, one of the bases for G.K. Chesterton's remark:

[T]he great ideals of the past failed not by being outlived (which must mean over-lived), but by not being lived enough. Mankind has not passed through the Middle Ages. Rather mankind has retreated from the Middle Ages in reaction and rout. The Christian ideal has not been tried and found wanting. It has been found difficult; and left untried.⁵⁹

53. LEO TOLSTOY, *THE KINGDOM OF GOD IS WITHIN YOU: CHRISTIANITY NOT AS A MYSTIC RELIGION BUT AS A NEW THEORY OF LIFE* 213-14 (Constance Garnett trans., Univ. of Neb. Press 1984) (1894).

54. See, e.g., *Leviticus* 19:18 (Douay Rheims) ("Seek not revenge, nor be mindful of the injury of thy citizens. 'Thou shalt love thy friend as thyself.'"); *Proverbs* 25:21 (Douay Rheims) ("If thy enemy be hungry, give him to eat: if he thirst, give him water to drink."); *Proverbs* 24:29 (Douay Rheims) ("Say not: I will do to him as he hath done to me: I will render to every one according to his work."); *Lamentations* 3:30 (Douay Rheims) ("He shall give his cheek to him that striketh him, he shall be filled with reproaches.").

55. See, e.g., Raymond B. Marcin, *Schopenhauer's Theory of Justice*, 43 CATH. U. L. REV. 813, 848-57 (1994).

56. *Matthew* 5:39 (Douay Rheims).

57. *Id.* at 5:40.

58. *Id.* at 5:41.

59. G. K. CHESTERTON, *WHAT'S WRONG WITH THE WORLD* 48 (Sheed & Ward 1942) (1910).

Chesterton's great epithet occurs in the midst of a great lamentation over the fact that divisiveness among Christians throughout history has been occasioned by Christians and Christian leaders *not* living up to the Christian ideal.⁶⁰ Instead, people professing to be Christians adopted only the trappings of Christianity in their wars and oppression but showed scant evidence of genuine Christlikeness.⁶¹

The conventional response to Chesterton's statement is often an eager nod and a "How true! How true!" But think of it; if there *is* truth in Chesterton's statement, and few would doubt that there is, what is it in the ideal of Christianity that has been found difficult and has *not* been tried? Perhaps most, surveying the wreckage of the wars, inter-Christian martyrdoms, and the divisiveness of the past history of what used to be called Christendom, would identify the Christian ideal of *love* as what has been missing. If Tolstoy can be credited with any great discovery, or perhaps re-discovery, it is the discovery of the very obvious fact that the true Christian ideal of *love* is embodied in the challenging injunction of Jesus to love our *enemies* and that the nonresistance-to-evil ethic is what lies at the very heart of Jesus' teaching and, therefore, must be the key to complying with His challenge to love one's enemies. It was not, according to Tolstoy, a mere tenet among tenets. It was the linchpin that held all of Jesus' teachings together.⁶² Much of the first six chapters of Tolstoy's book, *My Religion*, is devoted to making the Biblical and hermeneutical case for that very proposition.

A. *Alternative Interpretations of Jesus' Nonresistance-to-Evil Ethic*

In the historical context, scholarly interpretations of Jesus' nonresistance-to-evil command came fast and early. Saint Augustine's commentary, written in 393 or 394 A.D., is remarkable today for its scholarship and lucidity.⁶³ It both broadened and narrowed the command, and it contained what is probably the conventional wisdom today on the dilemma of the nonresistance-to-evil command and the Christian lawyer.⁶⁴

In a sense, Saint Augustine broadened any superficial understandings of the nonresistance-to-evil injunction when he pointed out the progression that appears in the examples Jesus gave. Saint Augustine stated:

60. *See id.*

61. *See id.*

62. TOLSTOI, MY RELIGION, *supra* note 6, at 16-17.

63. Saint Augustine, *supra* note 27, at 80-105.

64. *See id.*

[N]o matter what the “*right cheek*” may signify, it is certainly more highly prized than what the left cheek symbolizes; when a man has suffered an injury with respect to something very highly prized, it is less hardship for him to bear with an injury regarding something less highly prized. The next precept of the Lord is that the cloak also be given to the man who wishes to take away the tunic. Now, the cloak is of the same value as the tunic, or of little more value, but certainly not twice as valuable. Thirdly, with regard to the mile to which He says that two more are to be added, He commands you to refrain from resisting further injury even though it be twice as great.⁶⁵

The sense of this observation is that Jesus has not simply demanded more than the *lex talionis* of the Hebrew Scriptures had demanded.⁶⁶ He did not simply *reverse* the *lex talionis*. He *more than* reversed it. The person subjected to an injustice must invite not just another injustice of a lesser or of a similar degree, but must invite an injustice of a *greater* degree.⁶⁷

The rationale behind this extraordinary ethical demand can be thought of as two-fold. On the one hand there is the obvious benefit to the person practicing the ethic. Practice begets habit, and habit begets character. The person practicing the ethic becomes a better person — a more caring, loving, and understanding person. On the other hand — and this is not as clear in the writings of Saint Augustine as it is in the inspired writings of Saint Paul — the nonresistance-to-evil ethic also has a beneficial effect on the perpetrator of the injustice.

Saint Paul made this rationale clear when he referred to Jesus’ ethical principle in his Epistle to the Christians at Rome:

Revenge not yourselves, my dearly beloved; but give place unto wrath, for it is written: *Revenge is mine, I will repay*, saith the Lord.

But if thy enemy be hungry, give him to eat; if he thirst, give him to drink. For, doing this, thou shalt heap coals of fire upon his head.

Be not overcome by evil, but overcome evil by good.⁶⁸

The meaning of “*thou shalt heap coals of fire upon [thy enemy’s] head*” may not be completely clear in today’s English usage. It is a figure of speech, and it has universally been understood by Biblical commentators

65. *Id.* at 88.

66. *Lex talionis* is the “eye for an eye” ethic. *Exodus* 21:24 (Douay Rheims); *Leviticus* 24:20 (Douay Rheims); *Deuteronomy* 19:21 (Douay Rheims).

67. *Matthew* 5:38-44 (Douay Rheims); Saint Augustine, *supra* note 27, at 88.

68. *Romans* 12:19-21 (Douay Rheims).

to refer to a sometimes painful touching of the conscience of the wrongdoer.⁶⁹

Saint Augustine, however, also narrowed the command somewhat when he suggested, as so many have done after him, that Christians need not always *physically* comply in response to evil:

[T]he Lord Himself — although He was certainly the first to fulfill the precepts of His own teaching — did not offer the other cheek to the servant of the high priest when that servant had struck Him on one cheek. On the contrary, He said: “If I have spoken evil, reproach me with the evil; but if I have spoken well, why dost thou strike me?”⁷⁰

Under Saint Augustine’s interpretation, what is the lesson for the Christian lawyer today? Jesus *did* respond to an unjust act with a defense, and a curious one, seemingly containing an invitation directing the evildoer to meet evil with evil.⁷¹ Did Jesus abrogate the nonresistance-to-evil command? As Saint Augustine saw it, the command was broader than a mere physical challenge; it was and is a challenge to *internalize* the law of love.⁷²

[M]any persons have learned to offer the other cheek, but have not learned to love the man by whom they are struck. . . . In His heart . . . [Jesus] was prepared not only to be struck on the other cheek for the salvation of all, but even to have His whole body nailed to a cross.

Therefore, the very next sentence is rightly understood as a precept with regard to the preparation of the heart, and not with regard to the visible performance of the deed. “*And whoever wishes to go to law with thee and to take thy tunic, give up to him thy cloak as well.*”⁷³

Other commentators have generally agreed with Saint Augustine’s interpretation that Jesus’ nonresistance-to-evil command was not so much a physical challenge as a call to internalize Christian love.⁷⁴ Some

69. See, e.g., NEW GENEVA STUDY BIBLE, *supra* note 31, at 1789-90 (suggesting that showing kindness to one’s enemy “may lead to conversion, or at least to such a sense of shame that evil behavior is modified”).

70. Saint Augustine, *supra* note 27, at 85 (footnote omitted).

71. *Id.* at 82.

72. *Id.* at 86-87 (citing Jesus’ instruction to apply justice only if the injury done has been overcome by the spirit of forgiveness).

73. *Id.* at 85.

74. See, e.g., BARCLAY, *supra* note 19, at 162-72 (citing Jesus’ command to give more in spirit than is expected as a measure of true justice, forgiveness, and love); HEINZ-HORST SCHREY ET AL., THE BIBLICAL DOCTRINE OF JUSTICE AND LAW 127-32 (1955) (discussing the juxtaposition of worldly law and Christian living).

have added a touch. A sophisticated exegete might mention the excessive use of hyperbole in Hebrew writings of the day.⁷⁵ None, however, has added anything substantive to Saint Augustine's fourth-century exegesis.⁷⁶

So, what does all of this mean for the Christian lawyer? Has Tolstoy's challenge been met? If Tolstoy was suggesting that a Christian cannot practice law and remain a Christian, the challenge has been met. Saint Augustine's interpretation would allow a Christian to practice law and to remain a Christian.⁷⁷ The Christian need not literally prescind from lawsuits and controversies.⁷⁸ If Tolstoy's challenge is met, however, what of Saint Augustine's? How is the law of *love*, forgiveness, and nonresistance to evil to be *internalized in the heart* of a Christian lawyer, charged with an ethical duty to protect zealously a client's proprietary and personal legal interests? And, indeed, *is* Tolstoy's challenge *fully* met? The prolific Bible commentator, William Barclay, has suggested that the internalized law of love in the nonresistance-to-evil command means that, in practical terms:

[t]he Christian thinks not of his rights, but of his duties; not of his privileges, but of his responsibilities. The Christian is a man who has forgotten that he has any rights at all; and the man who will fight to the legal death for his rights, inside or outside the Church, is far from the Christian way.⁷⁹

Almost a millennium after Saint Augustine gave us his exegesis on the Sermon on the Mount, Saint Thomas Aquinas compiled a commentary on the Four Gospels. The commentary was collected from the works of the Fathers of the Church, including those of Saint Augustine, and is

75. In *The Biblical Doctrine of Justice and Law*, there is such a mention regarding the suit-over-the-tunic example, but it does not seem to be the authors' main point of reliance. See SCHREY ET. AL, *supra* note 74, at 129.

76. Even Saint Thomas Aquinas's more philosophical explanation of the role of the Christian lawyer – his discussion of the virtue of fraternal correction, based, perhaps, on *Matthew* 18:15-17 – was anticipated by Saint Augustine. Saint Augustine, *supra* note 27, at 89-90. In the text of this article, there is no discussion of the suggestion that Jesus' command was directed not to the lawyer, but to the client (as it literally is). Such an approach, it would seem, entails acceptance of a "hired-gun" or moral-insulation view of lawyering.

77. Saint Augustine, *supra* note 27, at 89-90. Saint Augustine stated that correction is an acceptable form of punishment because it is an "exercise of mercy" when free of hatred. *Id.* Therefore, it is possible for the Christian lawyer to participate in a system of justice that is remedial and compensatory, rather than punitive and retributive. See *id.*

78. See *id.*

79. BARCLAY, *supra* note 19, at 167-68.

known by its Latin name, *Catena Aurea*.⁸⁰ Saint Thomas Aquinas's commentary largely agreed with and quoted copiously from Saint Augustine's works.⁸¹ Concerning Jesus' "civil lawsuit" example, Saint Thomas Aquinas condemned what might be called the negativity of the litigious mind set:

[E]very lawsuit irritates the heart and excites bad thoughts; for when you see dishonesty or bribery employed against you, you hasten to support your own cause by like means, though originally you might have intended nothing of the sort.⁸²

Saint Thomas Aquinas also stated, consistently with Saint Paul's observations,⁸³ the positive side of that sentiment:

We ought to fear much more *for* the men who rob us, than to be eager to save the inanimate things they take from us. When peace with our neighbor is banished [from] the heart on the matter of worldly possessions, it is plain that our estate is more loved than our neighbour.⁸⁴

If Saint Augustine's interpretation is correct, and the nonresistance-to-evil ethic is to be properly understood as a command to "internalize" Jesus' law of love, then Saint Thomas Aquinas put that command to internalize love in a context that returns us to our original Tolstoian quandary.⁸⁵ We are to fear "much more for" the evildoer than for our inanimate possessions. Our goal as Christians is the spiritual welfare of the enemy, not his or her defeat or come-uppance. In other words, there is moral danger in the very contentiousness involved in the lawsuit. The lawsuit presupposes and encourages an acquisitive mind-set that is the very antithesis of the spirit that ought to occupy the mind of the Christian.

B. A Contemporary Understanding of the Nonresistance-to-Evil Ethic

Interestingly, the well-known scriptural account of the woman taken in adultery should have had an influence on Tolstoy's understanding of "nonresistance."⁸⁶ It is at this point that we begin an effort to define a clearer understanding of contemporary *Christian* lawyering in order to

80. SAINT THOMAS AQUINAS, *CANTENA AUREA* (Venerable John Henry Cardinal Newman of the Oratory ed., Saint Austin Press 1997) (1841).

81. See, e.g., *id.* at 199-201.

82. *Id.* at 201.

83. See *Romans* 12:20 (Douay Rheims).

84. SAINT THOMAS AQUINAS, *supra* note 80, at 201 (emphasis added).

85. See *supra* notes 19-35 and accompanying text.

86. See *John* 8:1-11 (Douay Rheims); see also THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* 130 (1981).

rescue it from the otherwise devastating dilemma posed by Tolstoy and, of course, by God Himself in Jesus' Sermon on the Mount. In the story of the woman taken in adultery, the "evil"⁸⁷ demand occasioned by the woman's act of adultery, *was* resisted — but not with violence and not in kind.⁸⁸ It was resisted with a gentle and implicit acknowledgment of the law and a gentle suggestion that only one who is without sin has the right to enforce the law.⁸⁹

Because none of us is without sin,⁹⁰ Tolstoy rightly drew the conclusion that Jesus was indeed denying the possibility of human justice.⁹¹ That conclusion has left us with a paradox of sorts: the law was *not* resisted, and yet it *was* resisted. Its sentence was not executed on the woman because the hearts, one might say the consciences, of those who would have used it harshly were touched.⁹² Nonresistance to evil does not mean acceptance of evil. It means not responding to it *in kind*, not meeting harshness with harshness, or violence with violence.

Dedicated Scripture scholars who accept the Bible as the word of God often say that the Bible interprets itself or is its own best and perhaps only proper interpreter. Thus, these other incidents in the Bible, like the account of Jesus dealing with the situation of the woman taken in adultery, can shed light on what Jesus meant when He enjoined us to "resist not evil." Nonresistance to evil does not necessarily rule out every kind of advocacy; Jesus Himself can be viewed in the account as an *advocate* for the woman.⁹³ Nor is the account of Jesus and the woman taken in adultery the only example of a kind of advocacy that can be reconciled with the nonresistance-to-evil mandate.

Thomas L. Shaffer, author of *On Being a Christian and a Lawyer*, has suggested a model of lawyerly advocacy that may satisfy Tolstoy's bold challenge.⁹⁴ In Shaffer's model of the Christian lawyer, the process of advocacy looms large, and Shaffer's understanding of "advocacy" goes a long way towards answering the bold challenge of Tolstoy. "Advocacy," Shaffer insists, "is largely, in fact, the practice of *reconciliation*."⁹⁵

87. It is, of course, a bit awkward to refer to the demand as *evil* in light of its presence in the Hebrew Scriptures. See *Leviticus* 20:10 (Douay Rheims).

88. *John* 8:6-9 (Douay Rheims).

89. *Id.* at 8:7.

90. See, e.g., 1 *John* 1:8 (Douay Rheims).

91. See *supra* notes 19-28 and accompanying text.

92. See *John* 8:3-11 (Douay Rheims).

93. See *id.*

94. SHAFFER, *supra* note 86, at 111.

95. *Id.* (emphasis added).

Shaffer's model for this "reconciliation" brand of lawyerly advocacy is the Prophet Nathan.⁹⁶ Those of us schooled in Judeo-Christian traditions will recall that the difficult task assigned by God to Nathan was prosecutorial — to bring King David to justice.⁹⁷ David had committed acts of gross injustice against one of his lieutenants, Uriah the Hittite.⁹⁸ Coveting and then taking Uriah's wife, Bathsheba, David then sent Uriah to the war front — the *front* of the war front — and predictable death.⁹⁹ Nathan successfully indicted David first by telling him an analogous tale of injustice involving the very shabby and lethal treatment of a beloved pet animal, then by eliciting the king's own statement condemning that injustice, and finally by revealing to the king the analogy between the tale of injustice and the king's own treatment of Uriah.¹⁰⁰

Shaffer's main point is that we, as advocates, succeed most readily and most fully when we, "as Nathan did, first engage conscience."¹⁰¹ One thinks, as does Shaffer, of the advocates, Mohandas K. Gandhi and Martin Luther King, Jr., who first engaged conscience, and achieved society-altering success:

The greatest advocates of our century — people such as Martin Luther King, Jr. or Mohandas Gandhi — have been Nathans. What made these advocates unique was their concern with goodness They appealed not to power but to conscience. Their advocacy tended to reconcile people rather than defeat them, as David was reconciled rather than defeated.¹⁰²

C. The Conventional Model of Lawyerly Advocacy

Shaffer's is a healing, reconciling model of lawyerly advocacy.¹⁰³ That model certainly exists in our society and even among some lawyers in our system of justice. But, in candor, it cannot be said to be the predominant model, and it is certainly not the norm. The norm, according to Shaffer, is found in "[o]ur professional tradition nourished by images of the champion."¹⁰⁴ It is an attractive norm, this image of a champion of another's cause, doing battle righteously, uncompromisingly — the

96. *Id.* at 112-13.

97. 2 *Kings* 12:1-13 (Douay Rheims) (2 *Samuel* 12:1-13).

98. *Id.* at 11:1-27 (2 *Samuel* 11:1-27).

99. *Id.* at 11:15-17 (2 *Samuel* 11:15-17).

100. *Id.* at 12:1-13 (2 *Samuel* 12:1-13).

101. SHAFFER, *supra* note 86, at 116.

102. *Id.* at 113.

103. *Id.* at 111.

104. *Id.*

knight in the right, the avenging angel bringing evil to its just end. We like this norm, this image of the champion. It exudes courage, steadfastness in the face of danger, and many of the qualities that we feel ennoble us. The trouble is that this image of a champion of another's just cause, resisting injustice and evil, is exactly the image that Jesus *condemned* in His Sermon on the Mount.¹⁰⁵ This image, condemned by Jesus, is identified with precision in the examples Jesus Himself used: the criminal assault, the civil lawsuit, and the act of political oppression.¹⁰⁶

The nonresistance-to-evil command clearly upsets the conventional model of legal advocacy by challenging what many attorneys would accept as the highest traditions of the bar. It discomforts us. The value of Shaffer's work is that it assists in pinpointing the source of the discomfort caused by Jesus' nonresistance-to-evil command.¹⁰⁷ Returning to the Biblical account of Nathan and David, Nathan was indeed a champion doing battle, but he was not an avenging angel.¹⁰⁸ Nathan's battle, in a very real sense, was not *against* David, but *with* him; the prosecutor and defendant alike joined in a quest to understand evil and abandon resistance to the acknowledgment of evil.¹⁰⁹ In Nathan, we see all the virtues that we admire in the champion — undeniable courage, steadfastness in the face of danger — but we do not feel the discomfort associated with an adversarial proceeding. The result of Nathan's advocacy was a healing, a reconciliation.¹¹⁰

The result of the conventional "avenging angel" model of advocacy is — what? Vengeance? The evil-doer getting his or her due? Frustration of the evildoer's mischievous design? The defeat, the come-uppance of the evil-doer? The possibilities abound, but none of them seems to provide us a satisfactory answer. The wrong is frustrated, but not righted. Injustice is perhaps balanced out, but somehow justice is not fully established. The avenging angel does not heal, but Nathan healed.

105. See *Matthew* 5:38-44 (Douay Rheims).

106. See *supra* note 20 and accompanying text. Recall that *all three examples* involve situations that implicate courts, lawyers, and lawyering: the *criminal assault*, the *civil lawsuit*, and *political oppression*. See *supra* notes 29-31 and accompanying text.

107. See generally SHAFFER, *supra* note 86, at 111-20.

108. See *2 Kings* 12:1-15 (Douay Rheims) (*2 Samuel* 12:1-15).

109. See *id.*

110. See *id.* at 12:13 (*2 Samuel* 12:13) ("And David said to Nathan: I have sinned against the Lord. And Nathan said to David: The Lord also hath taken away thy sin: thou shalt not die.").

IV. FROM JESUS TO TOLSTOY TO GANDHI

One of the examples to which Shaffer refers in explaining his notion of a healing and reconciling brand of legal advocacy is Mohandas K. Gandhi.¹¹¹ Although Shaffer acknowledged that Gandhi was *not* a lawyer,¹¹² Gandhi nevertheless *was indeed* a lawyer — a London-University-educated British barrister, admitted to the Inner Temple and enrolled in the High Court.¹¹³ Of course, Gandhi's legal practice was not of the everyday office-advising, courtroom-advocacy variety. Instead, today it would be called "law reform" work, albeit on a grand national and even international stage. Through Gandhi, we see what effect the nonresistance-to-evil ethic might have on the lawyerly activity known as "law reform."

We do not often think of Gandhi as a lawyer, much less as a legal scholar, and yet he was both.¹¹⁴ Perhaps his stature as a modern-day saint gets in the way. Or perhaps we neglect his legal scholarship because his writings do not contain analyses of the pronouncements of Holmes, Cardozo, Pound, or Bentham. We cannot seem to take seriously as a legal scholar one who has not bowed in obeisance before the framers of the Western legal mind. One thing that Gandhi himself took seriously, however, was Jesus' Sermon on the Mount.¹¹⁵ In addition, Gandhi was a self-confessed moral disciple of Tolstoy.¹¹⁶ Beyond all that, one of the main tenets of Gandhi's "jurisprudence" was the Hindu concept of *ahimsa*.¹¹⁷ This concept can easily be compared to Saint Augustine's law of love "internalized" or the love of one's enemies.¹¹⁸

Gandhi's thought is difficult to encapsulate because it was so action-specific and context-dependent, but its grounding in Jesus' nonresistance-to-evil ethic (as well as Hindu philosophy) was clear. Gandhi wrote:

We punish thieves, because we think they harass us. They may leave us alone; but they will only transfer their attentions to another victim. This other victim however is also a human

111. See SHAFFER, *supra* note 86, at 131.

112. See *id.*

113. See LOUIS FISCHER, *GANDHI: HIS LIFE AND MESSAGE FOR THE WORLD* 19 (1954); see also STANLEY WOLPERT, *GANDHI'S PASSION: THE LIFE AND LEGACY OF MAHATMA GANDHI* 26 (2001).

114. WOLPERT, *supra* note 113, at 26; M. K. GANDHI, *NON-VIOLENT RESISTANCE (SATYAGRAHA)* (Schocken Books 1961) (1951).

115. See, e.g., GANDHI, *NON-VIOLENT RESISTANCE*, *supra* note 114, at 375.

116. See, e.g., MOHANDAS K. GANDHI, *GANDHI ON CHRISTIANITY* 11 (Robert Ellsberg ed., 1991).

117. *Id.* at 41.

118. See *supra* notes 68-73 and accompanying text.

being, ourselves in a different form, and so we are caught in a vicious circle. The trouble from thieves continues to increase, as they think it is their business to steal. In the end we see that it is better to endure the thieves than to punish them. The forbearance may even bring them to their senses. By enduring them we realize that thieves are not different from ourselves, they are our brethren, our friends, and may not be punished. But whilst we may bear with the thieves, we may not endure the infliction. That would only induce cowardice. So we realize a further duty. Since we regard the thieves as our kith and kin, they must be made to realize the kinship. And so we must take pains to devise ways and means of winning them over. This is the path of *ahimsa*.¹¹⁹

One need not be a careful reader to notice the similarity between Gandhi's *ahimsa* and Jesus' love of enemies.¹²⁰ As we have seen, Jesus did not stop at the nonresistance-to-evil command. In the Sermon on the Mount, one is told that he or she must not resist evil, and then one is told what he or she must affirmatively do, for example, turn the other cheek. Similarly, under Gandhi's *ahimsa*, one does not stop at nonresistance.¹²¹ One must take steps to affirmatively apprise the evildoer of his or her human identity.

Gandhi's great discovery, in both the Sermon on the Mount and the underpinnings of Hindu spiritualism, was that by accepting the physical consequences of the unjust act, and more importantly, by bringing the fact of that injustice and the fact of shared human identity to the attention of the evildoer by "first engag[ing] conscience,"¹²² the doer of God's will "heap[s] coals of fire upon [the evildoer's] head."¹²³ This creates a situation of true, thorough, and ultimate justice instead of the forced physical representation of justice with which courts and legislatures must content themselves.

119. GANDHI, CHRISTIANITY, *supra* note 116, at 41.

120. Compare *id.* with Matthew 5:44 (Douay Rheims).

121. Gandhi's *ahimsa* is *not* an ethic of *non*-resistance to evil, but rather an ethic of nonviolent *resistance* to evil. See GANDHI, NON-VIOLENT RESISTANCE, *supra* note 114, at 40-42. The name given to the ethic, however, seems far less important than its paradoxical message: evil is most effectively *resisted* through *non*resistance. See *id.* Gandhi himself disliked the adjective "passive," which has been so often applied to his resistance (or nonresistance) activities. See MAHATMA GANDHI, ALL MEN ARE BROTHERS: AUTOBIOGRAPHICAL REFLECTIONS 91-92 (Krishna Kripalani ed., Continuum 1982) (1958).

122. SHAFFER, *supra* note 86, at 116.

123. Romans 12:20 (Douay Rheims).

Gandhi once wrote, "That action alone is just which does not harm either party to a dispute."¹²⁴ Tolstoy took the nonresistance-to-evil ethic seriously, more seriously than most scholars before him, while Mohandas K. Gandhi put that ethic into action, more directly and uncompromisingly than any social reformer before him. Gandhi sought the justice that was missing in the British colonial rule over India, in the Hindu treatment of the untouchables,¹²⁵ in the relationships between Hindu and Moslem Indians, and in the apartheid of South Africa.¹²⁶ His method of achieving that missing justice in those settings was, quite simply, love — the love that underlies the nonresistance-to-evil ethic.

V. CONCLUSION

Perhaps one may easily conclude that if Tolstoy's, or even Saint Augustine's, interpretation of the nonresistance-to-evil ethic in Jesus' Sermon on the Mount has validity, the Christian lawyer must not only rethink his or her role as a lawyer, but also rethink his or her role as a *Christian*. Reconciling the nonresistance-to-evil ethic with the law as it is currently practiced in ordinary law firms is not easy, and it may well be impossible. Those who view themselves as Christians and who accept the tenets of the Sermon on the Mount as Tolstoy, Saint Augustine, and Jesus Himself did, may need an entirely new framework for the practice of law. Today's contentious and litigious society does not provide a welcoming atmosphere for translating those tenets into the everyday office-counseling and courtroom-advocacy tasks that lawyers typically perform.

Despite that difficulty, however, many Christian lawyers are specializing in alternative dispute resolution and mediation techniques¹²⁷ and are putting models resembling Shaffer's "reconciliation" version of lawyerly advocacy to the test.¹²⁸ The Christian Legal Society sponsors programs in legal aid and Christian conciliation that strive to be faithful to a Biblical perspective on dispute resolution.¹²⁹ A dynamic

124. Mahatma Gandhi, *Ahmedabad Mill-Hand's Strike, Leaflet No. 6* (March 3, 1918), in 14 THE COLLECTED WORKS OF MAHATMA GANDHI 233 (1965) (quoted in ERIK H. ERIKSON, *GANDHI'S TRUTH: THE ORIGINS OF MILITANT NONVIOLENCE* 342 (1969)).

125. GANDHI, *NON-VIOLENT RESISTANCE*, *supra* note 114, at 180-81.

126. See Bharatan Kumarappa, *Editor's Note* to GANDHI, *NON-VIOLENT RESISTANCE*, *supra* note 114, at iv.

127. See, e.g., Glenn G. Waddell & Judith M. Keegan, *Christian Conciliation: An Alternative to "Ordinary" ADR*, 29 CUMB. L. REV. 583 (1999).

128. See SHAFFER, *supra* note 86, at 111-20 (discussing the practice of reconciliation).

129. See The Christian Legal Society, at <http://www.clsnet.org> (last modified Dec. 13, 2002).

organization known as Peacemaker Ministries is allied with the Christian Legal Society in the furnishing of Christian conciliation services in a setting that purports to be faithful to Biblical forms of conflict resolution.¹³⁰

If one seeks to find a new, and sorely needed, more positive image for the lawyer anywhere in our society today, one may discover it in the new and emerging understandings of the lawyer's role in conciliation, reconciliation, and the healing of the rends in the social fabric that programs like these stimulate. The adventure exists for all who wish to explore the *uniqueness* of what it truly means to be a *Christian* lawyer.

130. See Peacemaker Ministries, at <http://www.peacemakerministries.org> (last visited Jan. 8, 2003).